No. 77-372

In the Supreme Court of the United States

OCTOBER TERM, 1977

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; AND BELL TELEPHONE LABORATORIES, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI UNDER 28 U.S.C. 1254 TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND UNDER 28 U.S.C. 1651(a) TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals denying a common law writ of certiorari under 28 U.S.C. 1651(a) (Pet. App. 1a) is unreported. The opinion and order of the district court (Pet. App. 2a–12a) are reported at 427 F. Supp. 57. The order of the district court

denying petitioners' motion to dismiss the complaint (Pet. App. 13a) is unreported.[1]

JURISDICTION

The order of the court of appeals (Pet. App. 1a) was entered on May 26, 1977, and a petition for rehearing was denied on July 7, 1977. The petition for a writ of certiorari to the court of appeals under 28 U.S.C. 1254, or to the district court under 28 U.S.C. 1651(a) [2] was filed on September 8, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (l) and 28 U.S.C. 1651 (Pet. 1–2).

QUESTIONS PRESENTED

1. Whether in a government civil antitrust case, the court of appeals abused its discretion in denying petitioners' application for a common law writ of certiorari under 28 U.S.C. 1651(a) to review an interlocutory ruling of the district court, that federal and state laws regulating telecommunications service do not confer blanket immunity from the antitrust laws upon the American Telephone and Telegraph Company and its manufacturing and research affiliates ("AT&T"), and that particular questions concerning the primary and exclusive jurisdiction of the Federal Communications Commission over activities of AT&T should be deferred until discovery and refinement of the issues.

[1] This Court's order denying petitioners' earlier motion for leave to file a petition for a writ of certiorari and/or petition for a writ of certiorari before judgment is reported at 429 U.S. 1071.

[2] Petitioners have failed to comply with Rule 31(1) of this Court's Rules, which requires that "[t]he petition in any proceeding seeking the issuance of a writ by this court authorized by 18 U.S.C. § 1651(a) * * * shall be prefaced by a motion for leave to file such petition * * *."

2. Whether this Court should issue a writ of certiorari under 28 U.S.C. 1651(a) to the district court to review its above-described interlocutory ruling.

STATUTES INVOLVED

Section 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 2, is set forth at Pet. App. 14a; portions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*, are set forth at Pet. App. 14a–40a. Section 602(d) of that Act, 48 Stat. 1102, amending Section 11 of the Clayton Act, 38 Stat. 734, as amended, 15 U.S.C. 21, and pertinent provisions of Section 11 are set forth in the Appendix to this brief.

STATEMENT

A. On November 20, 1974, the United States filed a civil antitrust complaint charging petitioners, American Telephone and Telegraph Company ("AT&T"), and its subsidiaries, Western Electric Company and Bell Telephone Laboratories ("Bell Labs"), with violating Section 2 of the Sherman Act by attempting and conspiring to monopolize, and monopolizing telecommunications service and equipment (Pet. App. 44a–58a). The complaint also named as co-conspirators the 23 telephone companies wholly or partially owned by AT&T ("the Bell Operating Companies").[3]

[3] Petitioners and the Bell Operating Companies will sometimes be collectively described herein as AT & T.

B. The complaint alleged that the defendants and co-conspirators had violated Section 2 by obstructing the interconnection of other communications common carriers with AT&T, by obstructing the interconnection of customer-provided terminal equipment with the Bell system, by refusing to sell terminal equipment to Bell subscribers and by restricting AT&T purchases of telecommunications equipment requirements to Western Electric (Pet. App. 55a). The complaint prayed that Western Electric be divested from AT&T; that Western Electric be divested of sufficient manufacturing assets to insure competition in the manufacture and sale of telecommunications equipment; and that AT&T's Long Lines Department be separated from the Bell Operating Companies to the extent necessary to insure competition in telecommunications service and equipment (Pet. App. 57a).

Defendants answered the complaint but on February 20, 1975, the district court stayed discovery and further proceedings (Pet. App. 3a) to consider petitioners' claims that "they enjoy[ed] implied immunity from antitrust liability because they are subject to a pervasive scheme of regulation imposed by the Federal Communications Act [47 U.S.C. 151 *et seq.*] and state regulatory statutes * * * [and that] because the Court has no * * * jurisdiction herein, the question of primary jurisdiction cannot arise, and would not be an appropriate exercise of discretion in this case" (Pet. App. 4a).

At the invitation of the district court, the Federal Communications Commission filed a brief *amicus*

curiae. The Commission agreed with the United States that AT&T had no blanket immunity from antitrust liability under the Federal Communications Act, but that certain areas were within its exclusive or primary jurisdiction (Pet. App. 5a).[4]

C. Because there has been little discovery in this case, the nature of the issues for purposes of AT&T's claim of immunity has been developed largely in terms of what the government intends to prove under the allegations of its complaint. The government's contentions have been stated as arguments in various memoranda (Pet. App. 12a); they have not been embodied into pretrial orders, amendments, supplemental pleadings, responses to requests for more definite statements and disclosures on the record of the kind customarily associated with discovery because

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[4] The district court summarized the Commission's position as follows (Pet. App. 5a):

"* * * [T]he following three areas are impliedly delegated to the Commission's exclusive jurisdiction which antitrust courts should not disturb by *ad hoc* rulings: (1) in view of Section 214 of the Act, only the Commission may require, through its certification process, entry into or exit from a communications common carrier market; (2) in view of Section 201 of the Act, antitrust courts should not countermand Commission orders requiring carriers to interconnect their telephone systems; and (3) in view of Section 205 of the Act, courts should not base antitrust relief or remedies upon tariff provisions or conduct pursuant to tariff provisions which the Commission has either 'approved or prescribed' after the required investigation.

"The Commission urges the Court to refer unsettled issues which may substantially affect the Commission's regulatory policies to the Commission under the doctrine of primary jurisdiction and to take judicial notice where the Commission has settled such questions, so as to reconcile the regulatory scheme and the scheme of the antitrust laws."

the proceedings have been stayed (see *infra*, p. 12). To aid the Court, there follows a summary of the government's theory of its case under the complaint.

AT&T and its subsidiaries have enjoyed for decades [5] three major monopolies: AT&T's Long Lines Department has a monopoly in inter-city telecommunications services; AT&T's 23 operating companies have monopolies of local exchange telecommunications services in each of their respective franchise areas; and Western Electric has a monopoly in equipment manufacturing, including all three equipment submarkets, transmitting, switching, and terminal equipment. These monopolies give AT&T the ability, incentive, and leverage to defend against new competition and to strengthen and maintain its monopoly power in each market.

(*1*) *The inter-city service monopoly.* AT&T has used its power in the inter-city and local service markets to deter the entry of potential competitors and to force out those who succeeded in entering. Its actions were often in violation of the Communications Act and Federal Communications Commission policy, as well as the antitrust laws. It has engaged in predatory pricing [6] and has refused to interconnect with

[5] See generally Federal Communications Commission, *Telephone Investigation, Proposed Report* (1939) ("Walker Report"), and Danielian, *AT&T: The Story of Industrial Conquest* (1939).

[6] *American Telephone and Telegraph, Telpak*, 37 F.C.C. 1111, modified 38 F.C.C. 761, affirmed *sub nom. American Trucking Ass'ns, Inc.* v. *Federal Communications Commission*, 377 F. 2d 121 (C.A. D.C.), certiorari denied, 386 U.S. 943; *American Telephone and Telegraph, Revisions of Tariff FCC No. 260, Private Line Services Series 5000 (Telpak)*, 61 F.C.C. 2d 587. After Long Lines introduced lower rates for the transmission of digital signals, its principal digital transmission competitor, Datran, was forced into bankruptcy shortly after the conclusion of lengthy proceedings to examine these rates. The rates were ultimately found to be anticompetitive in effect, unreasonably low and subsidized by other services, and so in violation of the Communications Act and Commission policy. *American Telephone and Telegraph, Investigation into the Lawfulness of Tariff FCC No. 267, Offering a Dataphone Digital Service Between Five Cities ("DDS")*, 62 F.C.C. 2d 774.

competing carriers [7] or has delayed interconnection or offered it on a restrictive basis without justification in order to place competitors at a commercial disadvantage. AT&T local operating companies—whose services are needed by all long-distance carriers to reach individual customers—have also refused to deal with competitors or potential competitors of Long Lines, or have done so only on highly discriminatory terms and conditions.[8]

(*2*) ***The equipment manufacturing monopoly.*** The monopoly in equipment manufacturing stems from

[7] "Carrier interconnection" refers to physical or other connections between two communications carriers for the transmission of signals. AT&T interconnections with competing carriers are particularly significant where AT&T enjoys a monopoly service (usually local exchange service) which an inter-city carrier must utilize to reach its individual customers, and where AT&T has an existing inter-city line which another carrier wants to utilize to complete a longer line.

[8] *Bell System Tariff Offerings*, 46 F.C.C. 2d 413, affirmed *sub nom. Bell Telephone Co. of Pa.* v. *Federal Communications Commission*, 503 F. 2d 1250 (C.A. 3), certiorari denied, 422 U.S. 1026; *American Telephone and Telegraph, Offer of Facilities for Use by Other Common Carriers*, 52 F.C.C. 2d 727, affirmed *sub nom. Carpenter* v. *Federal Communications Commission*, 539 F. 2d 242 (C.A. D.C.); *Joint Petition of CPI Microwave, Inc., and Midwestern Relay Co.*, 54 F.C.C. 2d 502.

AT&T's monopolies in the other two markets. AT&T maintains the equipment monopoly by its policy of purchasing transmission, switching and terminal equipment almost exclusively from Western Electric, even where outside suppliers have better equipment available for earlier delivery at lower prices.[9]

Where AT&T's position as the principal buyer of equipment is not sufficient to protect Western Electrict's monopoly—*i.e.,* in the purchase of terminal equipment [10] by individual customers—AT&T has used other means to protect Western Electric's monopoly. For many years it prohibited its service customers from interconnecting their own (the customers') terminal equipment to telephone company lines. After restrictions on non-harmful interconnection were declared illegal,[11] AT&T required that customer-provided equipment be connected only through a needlessly complex and expensive interface device supplied by the operating companies, which the Commission found to be discriminatory and unreasonable.[12]

[9] *American Telephone and Telegraph, Charges for Interstate Telephone Service, Docket 19129, (Phase II)*, 64 F.C.C. 2d 1, 28 n. 47, 41.

[10] Terminal equipment includes all of the receiving instruments which a customer might use, from the familiar home telephone to complex switchboard and switchboard-type business telephone systems.

[11] *Hush-a-Phone Corp.* v. *United States*, 238 F. 2d 266, 269 (C.A. D.C.), reversing 20 F.C.C. 391, on remand, 22 F.C.C. 112; *Carterfone*, 13 F.C.C. 2d 420, reconsideration denied, 14 F.C.C. 2d 571.

[12] *Interstate and Foreign MTS and WATS*, 56 F.C.C. 2d 593, 58 F.C.C. 2d 736, affirmed *sub nom. North Carolina Utilities Commission* v. *Federal Communications Commission*, 552 F. 2d 1036 (C.A. 4), certiorari denied, No. 76–1675 (October 3, 1977). AT&T has also used other tactics to deter equipment competitors: selling telephone service and terminal equipment as a single unit ("bundling"); refusing to sell inside wiring to customers wishing to provide their own equipment; renting rather than selling terminal equipment to prevent the development of a secondary market in terminal equipment; and predatory pricing.

(3) *The local monopolies.* The 23 local operating companies' monopolies are used to support both Long Lines' and Western Electric's monopolies. Sometimes, though, they in turn receive support from the long-distance and equipment monopolies. For example, AT&T has denied Long Lines' services—toll interconnections—to new communities seeking to establish their own local exchange systems.[13]

In addition, the local operating companies have themselves sought to prevent the development of two new industries which would dilute their monopoly power: land mobile radio and community antenna television. In 1949 the Commission awarded frequencies to AT&T local operating companies and independent radio common carriers in the hope of developing "competing systems, techniques, and equipment" in the mobile telephone, paging and dispatch service markets served by land mobile carriers.[14] The local operating companies for years impaired the radio common carriers' development by refusing to

[13] This occurred recently at a planned community near Houston, Texas. *Mid-Texas Communications Systems, Inc.* v. *American Telephone and Telegraph*, S.D. Tex., Civil No. 73–H–1577, filed November 19, 1973.

[14] *General Mobile Radio Service*, 13 F.C.C. 1190, 1218.

interconnect them to the local and national telephone systems, or by interconnecting only on severely disadvantageous terms.[15]

AT&T operating companies have also sought to impede the development of an independent community antenna television ("CATV" or "cable") industry because of the potential competition it poses to the local operating companies' monopoly in the distribution of nonbroadcast communications services, such as data transmission. The operating companies denied cable operators pole space and then devised a channel lease service for cable operators to induce them not to develop their own plant. By means of delay and discriminatory treatment, AT&T has repeatedly used its monopoly power in local service to stymie the development of these competitors.[16]

D. On November 24, 1976, the district court ruled that it has jurisdiction in the case (Pet. App. 2a–12a). It rejected as contrary to the language and history of the Communications Act petitioners' claim that they have an implied, blanket immunity for all violations of the antitrust laws which they might commit

[15] *Amendment of Part 21 of the Commission's Rules With Respect to the 150.8–162 Mc/s Band*, 12 F.C.C. 2d 841, 852, affirmed *sub nom. Radio Relay Corp.* v. *Federal Communications Commission*, 409 F. 2d 322 (C.A. 2).

[16] For an example of the impact of petitioners' tactics, see *Better TV., Inc.* v. *New York Telephone Co.*, 31 F.C.C. 2d 939. While AT&T is now negotiating with the CATV industry as a result of Commission intercession, many issues remain unresolved and the potential for cable development as a local distributor of innovative non-broadcast communications services has been delayed.

in the fields of communications services and equipment (Pet. App. 9a). The court held that immunity cannot be inferred from pervasiveness of regulation, but exists only where specific conflicts between antitrust and regulatory jurisdiction are found in discrete instances (Pet. App. 8a–9a). In the absence of any showing by petitioners at this stage in the proceedings of specific conflicts between regulatory and antitrust requirements, the court declined to dismiss any particular element of the complaint (Pet. App. 8a–9a). The court stated that some aspects of the complaint might well be subject to the Commission's primary jurisdiction, but ruled that until discovery had sufficiently sharpened the issues, reference was not appropriate (Pet. App. 11a).

E. On January 6, 1977, the defendants filed in this Court a motion for leave to file a petition for a common law writ of certiorari or a statutory writ of certiorari before judgment in the court of appeals (Pet. 12). Simultaneously they filed a petition for a common law writ of certiorari in the court of appeals. This Court on January 25, 1977, summarily denied the petition. 429 U.S. 1071.

The court of appeals on February 3, 1977, directed the United States to respond to the petition, and invited the Commission to submit its view *amicus curiae*. On May 26, 1977, the court of appeals (Bazelon and Wilkey, JJ.) denied the petition for certiorari in an order without opinion (Pet. 13; Pet. App. 1a). The court, on July 7, 1977, denied AT&T's petition for

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rehearing and rehearing *en banc,* no judge in active service having requested a poll of the circuit (Pet. 2).

The district court had lifted its stay of discovery on December 15, 1976, but the court of appeals issued a stay that remained in effect until its decision of May 26, 1977, and on August 11, 1977, issued a further stay pending disposition of the petition in this Court. In the district court, therefore, this case has not progressed beyond the complaint, answer, and rejection of AT&T's broad jurisdictional defense.

ARGUMENT

1. For the second time in less than a year petitioners seek extraordinary interlocutory review of their contention that state and federal regulation of communications carriers reflects an unstated congressional purpose totally to exempt all of their activities from the antitrust laws. The record is unchanged from what it was when this Court denied petitioners' applications on January 25, 1977, except that the court of appeals has denied petitioners' application for an extraordinary writ. That court's order, we submit, confirms the considerations outlined in our earlier opposition (No. 76–939), that piecemeal review of interlocutory decisions by extraordinary writ in this case is inappropriate. Those considerations—to which we adhere, but do not reiterate—are dispositive. Given the still preliminary stage of this case, and the well-established policy against interlocutory review in government civil antitrust cases (Memorandum for the United States, No. 76–939, p. 7),

as well as the demonstrable lack of merit in petitioners' sweeping claim of antitrust immunity (see pp. 14–28, *infra*), the court of appeals did not abuse its discretion in denying petitioners' application for a common law writ of certiorari under 28 U.S.C. 1651(a). *Kerr* v. *United States District Court,* 426 U.S. 394, 402–403.

Petitioners' claim that the costs of the litigation and the burdens of discovery warrant extraordinary review is unsound as a matter of law,[17] and is both speculative and exaggerated: once the district court is allowed to proceed with this long delayed antitrust case, the issues will be refined and the scope of discovery limited by that court as in any other large litigation.[18]

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[17] Memorandum for the United States, No. 76–939, pp. 4–7.

[18] Petitioners' description of the costs and burdens of the litigation are apparently based upon their claim that they must "prepare to defend each and every activity in which the Bell System has engaged since its inception which might arguably be said to be anticompetitive * * * review all of the documents in their own files relevant to any such activity * * * subpoena every non-party that may have been involved * * * and * * * even conduct discovery against the regulatory agencies that supervised and controlled these activities" (Pet. 16–17). Such boundless discovery is not justified by the complaint, which focuses upon specific areas of alleged misconduct (see pp. 6–11, *supra*, 22–28 *infra*). Petitioners disregard the district court's responsibility—which it expressly recognizes (Pet. App. 10a)—to define the issues and to dispose of specific questions of exclusive or primary administrative jurisdiction as they arise. There is no basis, therefore, for petitioners' contention that this single case will impair the functioning of the federal judicial system, or "chill" the regulatory process. The Federal Communications Commission, as *amicus curiae*, by supporting the

To the extent that petitioners contend that if their theory of implied blanket immunity is unacceptable, the court should make the case "more manageable" by deciding the elements the government may pursue under the complaint (Pet. 22–23), they invite this Court to undertake the district court's function of shaping the case for trial and to do so on the present undeveloped record. This approach is impractical because in its appellate capacity this Court does not have the pre-trial powers or responsibilities of the district courts; it is improper, because this Court should not undertake such functions; and it is inconsistent with petitioners' position in the courts below, where they sought outright dismissal of the complaint for lack of jurisdiction (Pet. App. 2a). Denial of the instant applications will not deprive petitioners of the alternative relief they seek; on the contrary, the district court will be able to resume its long-postponed task of defining the dimensions of the dispute.

2. The district court correctly held that petitioners' blanket claim of immunity is without merit (Pet. App. 8a), and that to the extent that particular activities covered by the complaint are within the exclusive or primary jurisdiction of the Federal Communications Commission, those questions must be resolved as the record develops (Pet. App. 10a).

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complaint subject to recognition of its responsibilities in carefully defined areas, has clearly indicated that the pendency of this suit will not interfere with the proper performance of its duties. Despite its enormous size, AT&T is as amenable to the judicial and administrative process as any other commercial organization.

A. Telephone companies, like other common carriers,[19] become subject to the antitrust laws when their activities extend into or affect interstate commerce.[20] This did not change when Congress subjected interstate telephone companies to regulation by the Interstate Commerce Commission in the Mann-Elkins Act of 1910, 36 Stat. 539.[20a] When, in the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. 151 *et*

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[19] *E.g.*, *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290; *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439; see *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U.S. 156, 161–162; accord, *Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, 555 F. 2d 687 (C.A. 9); *United States* v. *Morgan Drive-Away, Inc.*, 1974–1 CCH Trade Cases ¶74,888 (D. D.C.); *Monticello Heights, Inc.* v. *Morgan Drive-Away, Inc.*, 1974–2 CCH Trade Cases ¶75,282 (S.D.N.Y.); *In re Grand Jury Subpoena Duces Tecum*, 405 F. Supp. 1192 (N.D. Ga.).

[20] *United States* v. *American Telephone and Telegraph Co.*, 1 Decrees and Judgments in Civil Federal Antitrust Case 572 (D. Ore.); *United States Telephone Co.* v. *Central Union Telephone Co.*, 202 Fed. 66 (C.A. 6), certiorari denied, 229 U.S. 620. Indeed, it was to forestall further government antitrust suits that AT&T in 1913 made the so-called "Kingsbury Commitment" to Attorney General McReynolds, in which it agreed to divest Western Union, to cease its acquisition of competing independent telephone operating companies, and to interconnect with noncompeting independent telephone companies. Danielian, *supra*, at 76–77; Walker Report, *supra*, at 155–156.

[20a] In 1920 Congress passed the Transportation Act, 41 Stat. 456. This statute increased the Interstate Commerce Commission's power over railroads but left regulation of communications carriers substantially the same as it had been. The Committee Report states: "[T]he committee left the control of wire systems practically as it was under the interstate commerce act prior to [wartime] Federal control." H.R. Rep. No. 456, 66th Cong., 1st Sess. 11 (1919); see also, H.R. Conf. Rep. No. 650, 66th Cong., 2d. Sess. 61 (1920).

seq., Congress consolidated regulatory authority over communications in the Federal Communications Commission, it clearly indicated an intent to limit antitrust exemption to narrow and clearly defined situations and otherwise provided for application of the antitrust laws to communications common carriers. First, the Act contains two specific grants of immunity which, of course, would be "mere redundancy" (*Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 307–308) if Congress had intended to confer a blanket immunity on communication carriers. Section 221(a) (47 U.S.C. 221 (a)), a continuation of the Willis-Graham Act of 1921, 42 Stat. 27, immunizes the merger or consolidation of telephone companies when approved by the Commission.[21] Section 222 (c)(1) was enacted in 1943 to permit the Commission to authorize the Western Union Telegraph Company to acquire its sole domestic competitor, the Postal Telegraph Company. Congress provided express antitrust immunity because it had concluded that "the antitrust laws now stand in the way of such consolidation and mergers." H.R. Rep. No. 69, 78th Cong., 1st Sess. 2 (1943). Second, Section 602(d) add[illegible]he Federal Communications Commission to the l[illegible]st of agencies authorized by Section 11 of the Clayton Act (15 U.S.C. 21) to enforce the prohibitions of that Act against price discrimination, rebates, mergers and interlocking directorates that injure competition or tend to monopoly (15 U.S.C. 13, 13a, 18 and 19). See *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439,

[21] The legislative history of the Willis-Graham Act shows that Congress intended to permit the regulatory agency to allow consolidation of competing local telephone companies that would otherwise violate the antitrust laws, but that the exemption was to apply only in this narrow area. See S. Rep. No. 75, 67th Cong., 1st Sess. (1921); 61 Cong. Rec. 1983–1985 (1921) (remarks of Representative Graham).

456. Section 11 expressly provides, however, that "[n]o order of the commission * * * shall in anywise relieve or absolve any person from any liability under the antitrust laws." 15 U.S.C. 21(e). Finally, the Act expressly provides in Section 414 that nothing contained in it "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. 414. Other statutory remedies therefore continue to be applicable unless their coexistence with the provisions of the act are "absolutely inconsistent." *Nader* v. *Allegheny Airlines*, 426 U.S. 290, 298–303.

These carefully tailored provisions show that Congress knew how to confer antitrust immunity on communications carriers when it wished to do so. Its limitation of such immunities in the Communications Act demonstrates that it did not intend to grant the sweeping exemption petitioners claim. Cf. *United States* v. *Borden Co.*, 308 U.S. 188, 201; *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458. The District Court, therefore, correctly concluded "that the Communications Act does not expressly, or impliedly, repeal the antitrust laws * * * [and that] [n]either the language, nor the legislative history of the Communications Act supports the conclusion that Con-

gress intended by that Act to grant a total, blanket immunity to defendants from application of antitrust laws, and to place exclusive jurisdiction over all their conduct in the Federal Communications Commission" (Pet. App. 9a).

B. Petitioners' broad assertion that "where the challenged conduct is subject to a pervasive scheme of common carrier regulation, such conduct is necessarily immune from the antitrust laws" (Pet. 25) is contrary to the decisions of this Court. It is well settled that common carriers may be liable under the antitrust laws despite "pervasive" common carrier regulation similar to Title II of the Communication Act.

In *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, this Court ruled that the Interstate Commerce Act did not immunize railroads from antitrust liability under Section 1 of the Sherman Act for collective price-fixing, even though the prices fixed were rates subject to Commission regulation. It stated that regulated firms "are not *per se* exempt from the Sherman Act," and that railroad common carriers "are subject to the anti-trust laws." *Id.* at 456. That decision reaffirmed *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U.S. 156, in which the Court held that awarding antitrust damages for a rate-fixing conspiracy was inconsistent with the stringent tariff provisions of the Interstate Commerce Act, but noted that those provisions did not bar the United States from enforcing the Sherman Act's injunctive and criminal provisions against carriers. *Id.* at 161–162.[22] Accord, *Terminal*

[22] Petitioners assert that *Georgia* involved a price-fixing combination, a "specific matter" which "was not subject to [pervasive common carrier] regulation * * *" (Pet. 27). The alleged anti-trust violation in *Georgia* was a conspiracy to fix rates filed with the Interstate Commerce Commission, and the regulatory agency, though possessed of "pervasive" powers, was without authority to regulate or punish it. Similarly, in the present case the actionable wrong is a wide-ranging monopolization of three telecommunications markets, and the Commission is likewise without authority to regulate or to punish it. Just as this Court in *Georgia* recognized that allowance of the antitrust action would promote rather than conflict with the agency's regulation (324 U.S. at 459–461), so allowance of this antitrust action would have the same beneficial results.

Petitioners also err in contending that *Georgia* is distinguishable because Congress had previously declined to confer on the Interstate Commerce Commission authority to regulate rate-fixing combinations (Pet. 27). The Court mentioned the matter only in passing and it is not central to the holding (324 U.S. at 457). In any event, Congress has also declined to grant the Federal Communications Commission authority to regulate petitioners' structure or intracorporate relations. *See* H.R. Rep. No. 1850, 73d Cong., 2d Sess. 3 (1934); S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934).

Warehouse Co. v. *Pennsylvania Railroad Co.*, 297 U.S. 500, 511, 515–516.

As the Court recently observed in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 597, n. 36, it "'has never held * * ** that the antitrust laws are inapplicable to anticompetitive conduct simply because a federal agency has jurisdiction over the activities of one or more of the defendants,'" quoting *Gordon* v. *New York Stock Exchange*, 422 U.S. 659, 692–693 (Stewart, J., concurring). Indeed, "[t]he Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory Act work, 'and even then only to the minimum extent necessary.'" *Id.* at 597, citing *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 391 (Stewart, J., dissenting). See *Silver* v. *New York Stock Exchange*,

373 U.S. 341, 357. *United States* v. *Philadelphia Nat. Bank,* 374 U.S. 321, 350–351; *California* v. *Federal Power Commission,* 369 U.S. 482.[23] The Court has also held that when "relationships are governed in the first instance by business judgment and not regulatory coercion," the antitrust laws apply, *Otter Tail Power*

[23] This is plainly reflected in the cases upon which petitioners rely (Pet. 25–26). In *Gordon* v. *New York Stock Exchange, supra,* the Court found implied immunity because a section of the Securities and Exchange Act contemplated that securities exchanges could, to the extent permitted by the Securities and Exchange Commission (SEC), fix their members' commission rates. In *United States* v. *National Association of Securities Dealers,* 422 U.S. 694, a specific provision of the Investment Company Act authorized, subject to SEC disapproval, vertical restrictions on the distribution of mutual shares. In *Keogh* v. *Chicago & Northwestern R. Co., supra,* 260 U.S. at 165, the Court held that an action by a shipper against a carrier under the antitrust laws for damages suffered from an alleged rate fixing conspiracy was incompatible with the stringent tariff provisions of the Interstate Commerce Act; the Court, nevertheless, held that the Act, as amended by the Transportation Act of 1920, 41 Stat. 456, did not bar the United States from enforcing the Sherman Act's injunctive and criminal provisions against carriers. 260 U.S. at 161–162. *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.,* 297 U.S. 500, following *Keogh,* held only that a private party claiming to have suffered business injury because a competitor had agreed with a rail carrier to receive illegal preferences had a damage remedy against the competitor only under the Interstate Commerce Act. The court expressly noted, however, that carrier participation in a conspiracy to restrain trade or monopolize would be subject to the antitrust laws. *Id.* at 511, 515–516. In *Pan American World Airways* v. *United States,* 371 U.S. 296, the court held that a monopolization complaint dealing with air route allocations charged the "*precise* ingredients of the [Civil Aeronautics] Board's authority" over air carriers certificates affiliations and routes (*id.* at 305; emphasis added) and therefore "the narrow questions presented by the complaint" (*id.* at 313) should be remedied by the Board under its powers to correct unfair methods of competition. Since the Board, unlike the Federal Communications Commission, had authority to provide the very remedy sought by the United States' antitrust suit dismissal was proper as a matter of judicial efficiency. *Id.* at 313, n. 19. The Court, moreover, expressly stated that the antitrust laws were not totally displaced even by that regulatory scheme. *Id.* at 304–305. In *Hughes Tool Co.* v. *Trans World Airlines,* 409 U.S. 363, the court held only that certain transactions were immune from the antitrust laws because the Civil Aeronautics Board had approved them under provisions of the Federal Aviation Act that triggered an express statutory immunity from the antitrust laws.

Co., supra, 410 U.S. at 374; *United States* v. *Radio Corporation of America,* 358 U.S. 334, 350–351.

Under these criteria, implication of an exemption from the antitrust laws arises only where, in particular cases, there is plain repugnancy between the antitrust laws and particular regulatory provisions. Immunity, therefore, does not turn on the presence or absence of pervasive regulation, but on whether specific types of conduct are required by the regulatory scheme or are indispensable to its functioning.

Insofar as petitioners rest their claim of blanket immunity on "pervasive regulation" by the States, the Court expressly rejected their contention in *Cantor, supra,* under the criteria summarized above.[24]

Petitioners' reliance (Pet. 37) on *Seatrain Lines, Inc.* v. *Pennsylvania R. Co.,* 207 F. 2d 255 (C.A. 3),

[24] In *Cantor, supra,* the Michigan Bell Telephone Co. and other Michigan public utilities unsuccessfully contended "that the competitive standard imposed by antitrust legislation is fundamentally inconsistent with the 'public interest' standard widely enforced by regulatory agencies, and that the essential teaching of *Parker* v. *Brown* [317 U.S. 341] is that the federal antitrust laws should not be applied in areas of the economy pervasively regulated by state agencies." 428 U.S. at 575.

is also misplaced. In *Seatrain* the court held that some portions of an antitrust complaint against railroads were within the primary jurisdiction of the Interstate Commerce Commssion and directed the dismissal of the complaint with leave to replead the various allegations that were outside the Commission's primary jurisdiction. In the present case the district court specifically recognized that some portions of the government's complaint might be found to be within the Commission's primary jurisdiction as the case developed (Pet. App. 11a), but petitioners have maintained that the doctrine of primary jurisdiction is not appropriate here (Pet. App. 4a).

C. By holding that "it has antitrust jurisdiction of at least some of the aspects of the case" (Pet. App. 9a), the district court recognized that at this stage it cannot determine what particular matters covered by the complaint might be exempt from the antitrust laws. Whatever questions concerning the primary jurisdiction of the Federal Communications Commission may appear as the case develops (Pet. App. 9a–11a), we submit that there is no "irreconcilable conflict" between the specific subject matter of this law suit and specific provisions of the Communications Act. Thus there is no basis for inferring an antitrust exemption for any of the particular activities challenged (see discussion pp. 6–11, 21, *supra*). This may be seen from a comparison of the specific charges in the complaint with the Commission's responsibilities under the Communications Act. Far from being conflicting, they are complementary.

(*1*) *Refusal to sell terminal equipment* (Pet. 29–32). One of the several means alleged by which AT&T monopolized the submarket for terminal equipment was the refusal of its operating companies to sell terminal equipment (Complaint, ¶29(f), Pet. App. 55a), thus forestalling development of a secondary market for used equipment and an independent repair industry.

Nothing in the Communications Act prohibits telephone companies from selling terminal equipment or authorizes refusals to sell for the purpose of preserving a monopoly. Although AT&T is required to furnish upon request the services and facilities necessary to perform its common carrier functions, the Act neither requires nor authorizes AT&T to exclude others from providing some part or all of the services or facilities involved, provided they obtain any necessary authorization. On the contrary, as AT&T recognizes (Pet. 30–31), the Act is neutral on the issue of terminal equipment sale. That AT&T's decision to sell or not sell terminal equipment might be embodied in a tariff filed with Federal or state agencies (Pet. 31–32) does not make its decision any less its own, or place it beyond the antitrust laws. *Cantor* v. *Detroit Edison Co., supra.*[25]

(*2*) *Refusal to allow interconnection of customer-provided equipment.* As part of its design to control the market for terminal equipment, AT&T allegedly

[25] It is our understanding that AT&T's policy of refusing to sell terminal equipment to customers has never been made part of any tariff filed with the Federal Communications Commission. AT&T's

has either prohibited or unreasonably restricted customers from interconnecting their own terminal equipment to AT&T's lines (Complaint, ¶29(e), Pet. App. 55a). Although AT&T speaks of a duty to provide "end-to-end service" (Pet. 32), the duty is self-appointed. The Communications Act contains nothing which requires or condones complete control by AT&T over terminal equipment. Conversely, a basic policy of the Act is to guarantee to telephone subscribers the right to make use of the telephone network in ways that are "privately beneficial without being publicly detrimental." *Hush-A-Phone Corp.* v. *United States,* 238 F. 2d 266, 269 (C.A. D.C.). Thus, the whole thrust of the Act is toward subscribers' freedom of choice in equipment. The Commission for three decades has been attempting to stop AT&T from interfering with customer rights guaranteed by the Act.[26] As the Commission said in the district court, the antitrust laws are fully compatible with that effort. FCC Amicus Br., pp. 16–18.

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suggestion that its practice is impliedly immune under the Communications Act because early in this century some states prohibited customers from owning terminal equipment (Pet. 30) is irrelevant. No such prohibition can be found in the Communications Act or its legislative history. Nor has a showing been made that AT&T's actions were required as a matter of state policy and thus exempt from the antitrust laws as "state action" under *Cantor* and *Parker* v. *Brown, supra.*

[26] *Use of Recording Devices in Connection with Telephone Services,* 11 F.C.C. 1033; *Jordaphone Corp. of America* v. *American Telephone and Telegraph,* 18 F.C.C. 644; *Hush-A-Phone* v. *American Telephone and Telegraph,* 22 F.C.C. 112; *Carterfone,* 13 F.C.C. 2d 420, reconsideration denied, 14 F.C.C. 2d 571; *Interstate*

(*3*) ***Carrier Interconnection.*** One alleged means AT&T used to protect its monopolies in inter-city communications services was to deny necessary interconnections to its inter-city competitors (Complaint, ¶29(a)–(d), Pet. App. 55a). Since competitors need the local distribution services of AT&T's local operating companies, denial of those local interconnections had a serious anticompetitive effect.[27]

The Communications Act generally leaves to the carriers' own business judgment the decision of whether or not to interconnect. It does not bar carriers from interconnecting, nor does it authorize them to deny interconnection for anticompetitive purposes. Section 201(a), 47 U.S.C. 201(a) empowers the Commission to order one carrier to interconnect with another where the public interest would be served thereby. Since interconnection is a matter primarily within the carriers' own business judgment, they are subject to the normal strictures of the antitrust laws, subject only to the Commission's authority to require interconnection where it is necessitated by the public interest. *Cf. Otter Tail Power Co.* v. *United States, supra.* Application of the antitrust laws imposes no incon-

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and Foreign MTS and WATS, 56 F.C.C. 2d 593, modified, 58 F.C.C. 2d 736, affirmed *sub nom North Carolina Utilities Commission* v. *Federal Communications Commission,* 552 F. 2d 1036 (C.A. 4), certiorari denied, No. 76–1675, October 3, 1977.

[27] AT&T also denied interconnections on an inter-city basis to competing carriers which needed such interconnection to carry signals where their own facilities do not go.

sistent standards on AT&T. The antitrust laws do not require interconnection where the Commission has prohibited it, or prohibit the interconnection where the Commission has required it.[28] The Commission, in fact, indicated below that application of the antitrust laws to such carrier practices would neither contradict the provisions of the Act nor impair the implementation of its policies. FCC Amicus Br., pp. 14–16.

(*4*) *AT&T equipment purchase policies.* Another alleged means AT&T has used to monopolize the market for equipment is its policy of purchasing its equipment needs largely from Western Electric (Complaint, ¶29(g) and (h), Pet. App. 55a), even where competitors offered better equipment sooner at lower cost.[29] The Commission has no direct authority over the non-operating activities of AT&T, and so no authority over its two non-operating companies, Western Electric and Bell Labs. Its sole contact with these two companies results from its regulation of the reasonableness of interstate service rates.[30] In determining a proper rate base, it may determine the reasonableness of AT&T's expenses in securing equipment and service from these two companies. And in computing AT&T's rate of return, it may take into account the rate of return being earned by Western Electric and Bell Labs. *Nader* v. *Federal Communications Commission,* 520 F. 2d 182, 195–198 (C.A. D.C.).

[28] Although the Commission has no express authority to prohibit interconnection, it urged before the district court that orders to interconnect which might affect regulatory policy should be referred to it under the primary jurisdiction doctrine. FCC Amicus Br., p. 15. We agree.

[29] Concomitantly, with minor exceptions it requires Western Electric to sell only to AT&T companies.

[30] *American Telephone and Telegraph, Charges for Interstate Telephone Service,* 64 F.C.C. 2d 1, 13 n. 21, 20 n. 31, 22.

Petitioners also contend that AT&T's vertical integration with Western Electric "contributes to [its] ability to fulfill its statutory duties" (Pet. 35). In fact, the Commission has found to the contrary, and has sought to free the operating companies from the coercive effect of Western Electric's involvement in their equipment-purchase decisions.[31] A significantly anticompetitive arrangement or practice which, in any event, does no more than "contribute" to AT&T's ability to satisfy its statutory obligation, can hardly be held immune from antitrust inquiry when the statutory duty could be met by an arrangement which is not anticompetitive. For that reason, the Commission

[31] *American Telephone and Telegraph, Charges for Interstate Telephone Service, supra,* n. 30. The Commission found that competition in communications equipment had produced and likely would continue to produce many benefits to consumers (64 F.C.C. 2d at 26), and that such competition was stifled by Western Electric's role in the operating companies' equipment purchase decisions (*id.* at 41). The Commission did not believe consumers were getting "the best quality and least costly equipment under present Bell system policies and practices" (*id.* at 42), which at least induced and sometimes compelled the operating companies to purchase their equipment from Western Electric notwithstanding better offers from competitors. The Commission ordered AT&T to change its equipment purchase decision-making system to give Western Electric less influence (*id.* at 43–45).

has indicated that the application of the antitrust laws to the relationship between Western Electric and AT&T would not necessarily interfere with the regulatory scheme. FCC Amicus Br., pp. 21–25.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the court of appeals or to the district court should be denied.

Respectfully submitted.

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NOVEMBER 1977.

Appendix

Section 602(d) of the Communications Act of 1934, 48 Stat. 1102, provides:

> The first paragraph of section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 [Clayton Act], is amended to read as follows:
>
> SEC. 11. That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communications or radio transmission of energy; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:"

Section 11(e) of the Clayton Act, 38 Stat. 736, as amended, 15 U.S.C. 21(e), provides in pertinent part:

> * * * No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust Acts.

U.S. GOVERNMENT PRINTING OFFICE: 1977